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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10 EASTERN DIVISION  
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12 JAMES L. LOWRY, ) No. EDCV 06-1386 CW  
13 )  
14 Plaintiff, ) DECISION AND ORDER  
15 v. )  
16 )  
17 MICHAEL J. ASTRUE, )  
Commissioner, Social Security )  
Administration, )  
Defendant. )  
\_\_\_\_\_ )

18  
19 The parties have consented, under 28 U.S.C. § 636(c), to the  
20 jurisdiction of the undersigned Magistrate Judge. Plaintiff seeks  
21 review of the Commissioner's denial of disability benefits. As  
22 discussed below, the court finds that the Commissioner's decision  
23 should be reversed and this matter remanded for further proceedings.

24 I. BACKGROUND

25 Plaintiff James Lowry was born on May 19, 1963, and was forty-two  
26 years old at the time of his administrative hearing. [Administrative  
27 Record ("AR") 54, 299.] He has a high school education and past  
28 relevant work experience as a automobile service consultant,

1 janitorial service trainer, automobile sales representative, retail  
2 store sales associate, landscape service supervisor and custodian. [AR  
3 17, 18.] Plaintiff alleges disability on the basis of seizures,  
4 tremors, pain, headaches and dizziness. [AR 72.]

## 5 **II. PROCEEDINGS IN THIS COURT**

6 Plaintiff's complaint was filed on December 14, 2006. On June  
7 15, 2007, defendant filed an answer and plaintiff's Administrative  
8 Record ("AR"). On August 16, 2007, the parties filed their Joint  
9 Stipulation ("JS") identifying matters not in dispute, issues in  
10 dispute, the positions of the parties, and the relief sought by each  
11 party. This matter has been taken under submission without oral  
12 argument.

## 13 **III. PRIOR ADMINISTRATIVE PROCEEDINGS**

14 Plaintiff filed a protective application for a period of  
15 disability, disability insurance benefits ("DIB") and supplemental  
16 security income ("SSI") on August 15, 2003, alleging disability since  
17 May 5, 2003. [AR 12, 54; JS 1.] After the application was denied  
18 initially and upon reconsideration, plaintiff requested an  
19 administrative hearing, which was held on January 9, 2006, before  
20 Administrative Law Judge ("ALJ") Jay Levine. [AR 299.] Plaintiff  
21 appeared with counsel, and testimony was taken from plaintiff and  
22 vocational expert Corrine Porter. [AR 300.] The ALJ denied benefits  
23 in a decision dated July 27, 2006. [AR 19.] When the Appeals Council  
24 denied review, the ALJ's decision became the Commissioner's final  
25 decision. [AR 5.]

## 26 **IV. STANDARD OF REVIEW**

27 Under 42 U.S.C. § 405(g), a district court may review the  
28 Commissioner's decision to deny benefits. The Commissioner's (or

ALJ's) findings and decision should be upheld if they are free of legal error and supported by substantial evidence. However, if the court determines that a finding is based on legal error or is not supported by substantial evidence in the record, the court may reject the finding and set aside the decision to deny benefits. See Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Tonapetyan v. Halter, 242 F.3d 1144, 1147 (9th Cir. 2001); Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001); Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); Moncada v. Chater, 60 F.3d 521, 523 (9th Cir. 1995)(per curiam).

"Substantial evidence is more than a scintilla, but less than a preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence which a reasonable person might accept as adequate to support a conclusion." Id. To determine whether substantial evidence supports a finding, a court must review the administrative record as a whole, "weighing both the evidence that supports and the evidence that detracts from the Commissioner's conclusion." Id. "If the evidence can reasonably support either affirming or reversing," the reviewing court "may not substitute its judgment" for that of the Commissioner. Reddick, 157 F.3d at 720-721; see also Osenbrock, 240 F.3d at 1162.

## V. DISCUSSION

### A. THE FIVE-STEP EVALUATION

To be eligible for disability benefits a claimant must demonstrate a medically determinable impairment which prevents the claimant from engaging in substantial gainful activity and which is expected to result in death or to last for a continuous period of at least twelve months. Tackett, 180 F.3d at 1098; Reddick, 157 F.3d at

721; 42 U.S.C. § 423(d)(1)(A).

Disability claims are evaluated using a five-step test:

Step one: Is the claimant engaging in substantial gainful activity? If so, the claimant is found not disabled. If not, proceed to step two.

Step two: Does the claimant have a "severe" impairment? If so, proceed to step three. If not, then a finding of not disabled is appropriate.

Step three: Does the claimant's impairment or combination of impairments meet or equal an impairment listed in 20 C.F.R., Part 404, Subpart P, Appendix 1? If so, the claimant is automatically determined disabled. If not, proceed to step four.

Step four: Is the claimant capable of performing his past work? If so, the claimant is not disabled. If not, proceed to step five.

Step five: Does the claimant have the residual functional capacity to perform any other work? If so, the claimant is not disabled. If not, the claimant is disabled.

Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995, as amended April 9, 1996); see also Bowen v. Yuckert, 482 U.S. 137, 140-142, 107 S. Ct. 2287, 96 L. Ed. 2d 119 (1987); Tackett, 180 F.3d at 1098-99; 20 C.F.R. § 404.1520, § 416.920. If a claimant is found "disabled" or "not disabled" at any step, there is no need to complete further steps. Tackett, 180 F.3d 1098; 20 C.F.R. § 404.1520.

Claimants have the burden of proof at steps one through four, subject to the presumption that Social Security hearings are non-adversarial, and to the Commissioner's affirmative duty to assist claimants in fully developing the record even if they are represented by counsel. Tackett, 180 F.3d at 1098 and n.3; Smolen, 80 F.3d at 1288. If this burden is met, a prima facie case of disability is made, and the burden shifts to the Commissioner (at step five) to

1 prove that, considering residual functional capacity ("RFC")<sup>1</sup>, age,  
 2 education, and work experience, a claimant can perform other work  
 3 which is available in significant numbers. Tackett, 180 F.3d at 1098,  
 4 1100; Reddick, 157 F.3d at 721; 20 C.F.R. § 404.1520, § 416.920.

#### 5 **B. THE ALJ'S EVALUATION IN PLAINTIFF'S CASE**

6 Here, the ALJ found that plaintiff had not engaged in substantial  
 7 gainful activity since his alleged disability onset date (step one);  
 8 that plaintiff had "severe" impairments, namely possible multiple  
 9 sclerosis with a history of seizure disorder, myalgia, weakness,  
 10 depression, numbness, paresthesia and vision disturbances (step two);  
 11 and that plaintiff did not have an impairment or combination of  
 12 impairments that met or equaled a "listing" (step three). [AR 14, 15.]  
 13 Plaintiff was found to have an RFC for unskilled sedentary work, which  
 14 would preclude a return to his past relevant work (step four). [AR 15,  
 15 17.] The vocational expert testified that a person with plaintiff's  
 16 RFC could perform other work existing in significant numbers in the  
 17 national economy, including small-item assembler, charge out clerk and  
 18 production inspector (step five). [AR 18.] Accordingly, plaintiff was  
 19 found not "disabled" as defined by the Social Security Act. [AR 19.]

#### 20 **C. ISSUES IN DISPUTE**

21 The parties' Joint Stipulation identifies two disputed issues:

- 22 1. Whether the ALJ properly considered all of the available

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 24 <sup>1</sup> Residual functional capacity measures what a claimant can  
 25 still do despite existing "exertional" (strength-related) and  
 26 "nonexertional" limitations. Cooper v. Sullivan, 880 F.2d 1152, 1155  
 27 n.s. 5-6 (9th Cir. 1989). Nonexertional limitations limit ability to  
 28 work without directly limiting strength, and include mental, sensory,  
 postural, manipulative, and environmental limitations. Penny v.  
Sullivan, 2 F.3d 953, 958 (9th Cir. 1993); Cooper, 800 F.2d at 1155  
 n.7; 20 C.F.R. § 404.1569a(c). Pain may be either an exertional or a  
 nonexertional limitation. Penny, 2 F.3d at 959; Perminter v. Heckler,  
 765 F.2d 870, 872 (9th Cir. 1985); 20 C.F.R. § 404.1569a(c).

1 medical evidence; and

2 2. Whether the ALJ properly evaluated plaintiff's subjective  
3 complaints and credibility.

4 [JS 2-3.]

5 As discussed below, Issue One is dispositive.

6 **D. THE MEDICAL EVIDENCE**

7 During the administrative hearing, plaintiff testified that he  
8 was diagnosed in 2003 with multiple sclerosis ("MS").<sup>2</sup> [AR 301.] The  
9 ALJ noted that there was no medical record contemporaneous with the  
10 diagnosis, and plaintiff admitted that he did not remember undergoing  
11 any tests for MS. [AR 301-02.] The ALJ noted that there were no  
12 diagnostic results in the record indicating MS and that up to "this  
13 point now there's no clear confirmation of MS." [AR 304.]

14 A neurological examination performed in January 2004 resulted in  
15 an assessment of an "ataxic gait" but "less likely it is MS." [AR  
16 209.] A consultative neurological evaluation performed in April 2004  
17 noted plaintiff's complaints of multiple sclerosis and seizure  
18 disorder. [AR 230.] Upon examination of plaintiff's motor function,  
19 it was noted that his gait was not remarkable, that he carried a cane  
20 but did not appear to need it, that his extremities appeared to be in  
21 the normal range of muscular power, and that plaintiff did not make a  
22 maximal effort in muscle testing. [AR 231.] Plaintiff received a

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24 <sup>2</sup> MS is a disabling impairment pursuant to the Listing of  
25 Impairments when one of three conditions is met: (1) disorganization  
26 of motor function in two extremities, resulting in sustained  
27 disturbance of gross and dexterous movements, or gait and station; (2)  
28 visual or mental impairment; or (3) significant, reproducible fatigue  
of motor function with substantial muscle weakness on repetitive  
activity, demonstrated on physical examination, resulting from  
neurological dysfunction in areas of the central nervous system known  
to be pathologically involved by the multiple sclerosis process. 20  
C.F.R. Pt. 404, Subpt. P, App. 1, § 11.09.

1 diagnosis of history of epileptic seizures. [AR 232.]

2 During this period, plaintiff's treating physician, Dr. Agnes  
3 Quion, repeatedly diagnosed plaintiff with MS.<sup>3</sup> [AR 253-58, 260-62,  
4 265-67, 269.] In December 2004, Dr. Quion referred plaintiff to a  
5 neurologist, Dr. Noel Bernales. [AR 278.] Dr. Bernales noted that a  
6 prior neurological evaluation had been conducted with unknown results.  
7 [AR 278.] Upon physical and neurological examination, Dr. Bernales  
8 concluded that plaintiff had a "possible demyelinating disease [such  
9 as MS] with superimposed seizure disorder" and instructed the  
10 plaintiff to produce all previous neurological testing completed up to  
11 that time. [AR 279.] In January 2005, Dr. Quion wrote a letter  
12 stating that she had conferred with Dr. Bernales, who classified  
13 plaintiff as suffering from a slow progressive type of MS. [AR 298.]  
14 In a follow-up note written in October 2005, Dr. Bernales reminded  
15 plaintiff of the need to obtain the previous records, to which  
16 plaintiff became "irate, expressing that he had tried to do so but has  
17 been unable." [AR 277.] Plaintiff insisted on receiving treatment for  
18 MS, but Dr. Bernales reminded him that "objective evidence of the  
19 presence of the disease needs to be clearly determined before  
20 initiating treatment." [Id.] At that point, plaintiff became "upset"  
21 and walked out of the room. [Id.]

22 In the administrative decision, the ALJ concluded that the  
23 "medical evidence of record does not establish that the claimant has  
24 multiple sclerosis" . . . "but rather only that he might have it." [AR

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25  
26 <sup>3</sup> Dr. Quion completed a functional assessment questionnaire  
27 stating that as a result of plaintiff's MS and other disorders, he  
28 should be expected to stand or walk less than two hours during an  
eight-hour workday, sit for about two hours in an eight-hour workday,  
lift less than ten pounds rarely, and be absent from work more than  
four days per month. [AR 295, 296.]

1 15.] As for Dr. Quion's letter referring to Dr. Bernales' diagnosis  
2 of MS, the ALJ noted that plaintiff had not cooperated with Dr.  
3 Bernales' evaluation and that "the diagnosis of multiple sclerosis was  
4 far from being properly established." [AR 17.] Accordingly, the ALJ  
5 declined to give Dr. Quion's findings any significant weight. [Id.]  
6 Plaintiff contends that the ALJ failed to consider properly the  
7 medical evidence. [JS 3.]

8 An ALJ has a "special duty to fully and fairly develop the record  
9 and to assure that the claimant's interests are considered . . . even  
10 when the claimant is represented by counsel." Celaya v. Halter, 332  
11 F.3d 1177, 1183 (9th Cir. 2003)(ellipsis in original) (quoting Brown  
12 v. Heckler, 713 F.2d 441, 443 (9th Cir.1983)). "Social Security  
13 proceedings are inquisitorial rather than adversarial. It is the  
14 ALJ's duty to investigate the facts and develop the arguments both for  
15 and against granting of benefits." Sims v. Apfel, 530 U.S. 103,  
16 110-111, 120 S. Ct. 2080, 147 L. Ed. 2d 80 (2000)(citing Richardson v.  
17 Perales, 402 U.S. 389, 400-401, 91 S. Ct. 1420, 28 L. Ed. 842 (1971));  
18 Higbee v. Sullivan, 975 F.2d 558, 561 (9th Cir. 1992)(per curiam).  
19 Ambiguous evidence, or the inadequacy of the record to allow for  
20 proper evaluation of the evidence, triggers a duty to develop the  
21 record further. Mayes v. Massanari, 276 F.3d 453, 459-60 (9th Cir.  
22 2001).

23 Here, the record is ambiguous as to whether plaintiff has MS,  
24 triggering a duty to develop the record further. Although the  
25 administrative decision accurately notes that a diagnosis of MS has  
26 not yet been properly established and has even been called into  
27 question, neither has it been definitively ruled out; moreover,  
28 plaintiff's treating physician has repeatedly made an assessment of



1 MS, and plaintiff's treating neurologist has indicated that such a  
2 diagnosis is possible and that further evaluation is necessary. In  
3 view of these circumstances, further development of this issue is  
4 necessary to make an informed decision regarding plaintiff's  
5 entitlement to disability benefits. See Hilliard v. Barnhart, 442 F.  
6 Supp. 2d 813, 817 (N.D. Cal. 2006)(finding independent duty to develop  
7 record when plaintiff merely "raised a suspicion" concerning an  
8 alleged impairment)(citation omitted). Accordingly, remand for  
9 further proceedings is appropriate.

10 **E. REMAND FOR FURTHER PROCEEDINGS**

11 The decision whether to remand for further proceedings is within  
12 the discretion of the district court. Harman v. Apfel, 211 F.3d 1172,  
13 1175-1178 (9th Cir. 2000). Where no useful purpose would be served by  
14 further proceedings, or where the record has been fully developed, it  
15 is appropriate to exercise this discretion to direct an immediate  
16 award of benefits. Harman, 211 F.3d at 1179 (decision whether to  
17 remand for further proceedings turns upon their likely utility).  
18 However, where there are outstanding issues that must be resolved  
19 before a determination can be made, and it is not clear from the  
20 record that the ALJ would be required to find the claimant disabled if  
21 all the evidence were properly evaluated, remand is appropriate. Id.  
22 Here, as set out above, outstanding issues remain before a finding of  
23 disability can be made. Accordingly, remand is appropriate.

1 VI. ORDERS

2 Accordingly, **IT IS ORDERED** that:

3 1. The decision of the Commissioner is **REVERSED**.

4 2. This action is **REMANDED** to defendant, pursuant to Sentence  
5 Four of 42 U.S.C. § 405(g), for further proceedings as discussed  
6 above.

7 3. The Clerk of the Court shall serve this Decision and Order  
8 and the Judgment herein on all parties or counsel.

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10 DATED: October 11, 2007

11 \_\_\_\_\_/S/\_\_\_\_\_  
12 CARLA M. WOEHRLE  
13 United States Magistrate Judge  
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